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ISSUES CONCERNING THE INITIAL FINANCING AND BUDGET OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(Prepared by the Secretariat)

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INTRODUCTORY NOTE

1. The Special Commission requested the Secretariat to prepare a background paper on the initial financing of the International Tribunal for the Law of the Sea. The present paper is based on the deliberations in the Special Commission as well as the existing international practice. The existing practice indicates the variety of means by which the initial financing of newly established international institutions and bodies has been secured. It would seem appropriate in arranging for the establishment of the International Tribunal to review the existing practice, given that the prospective circumstances surrounding its initial establishment may require an interim arrangement pending a permanent arrangement. There is no known precedent for the establishment of an international judicial body of the nature of the Tribunal which is independent of an umbrella organization. This, therefore, requires an innovative approach.
2. The Secretariat has therefore attempted in the present working document to put into perspective the existing practice in the financing of a new institution in the context of the United Nations.

I. GENERAL

3. In reviewing the question of arrangements for the initial financing of the Tribunal, the most relevant precedent would appear to be the United Nations itself and the recommendations of its Preparatory Commission. The practice adopted in that case has been followed in many other instances with some degree of modification depending on the manner in which the new international institution or body was established, its field of activity and the likelihood of full membership of the institution being attained with promptitude.
4. In complying with its mandate, the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea is required to prepare a series of recommendations which will be incorporated in the report of the Preparatory Commission to the first meeting of States Parties in accordance with paragraph 10 of resolution I. The report will contain recommendations covering all practical arrangements pertaining to the establishment and operation of the International Tribunal. Amongst these recommendations, there needs to be a report on the budgetary and financial arrangements that are required. As a matter of convenience, it would be appropriate to divide the budgetary recommendations into two sections:
(a) preliminary and provisional requirements for its initial establishment and

its early functioning; and (b) the permanent arrangements which will be of a long-term nature. This would be consistent with some existing precedents. ^{1/}

II. GOVERNING PRINCIPLES

5. The governing principles to be applied for financial responsibility, fiscal restraint, rational policies and proper administration should be determined and applied to the provisional and permanent arrangements. In addition, based on the preliminary exchange of views in Special Commission 4 concerning the budgetary and financial considerations that should be taken into account in establishing the Tribunal and for its continued functioning, it would seem necessary that:

(a) The provisional arrangements should, to the extent possible, minimize the initial costs to States Parties to the Convention, taking into account that the work of the Tribunal will evolve over a number of years;

(b) The development of the Tribunal into a full scale judicial body should be phased in;

(c) The phasing in should be on the basis of the anticipated and growing workload during the initial years. ^{2/}

6. As regards the continuing needs of a fully operational Tribunal, the factors to be taken into account should include the views expressed by Special Commission 4 while discussing the working papers on the administrative structure and finance submitted to it by the Secretariat and also the comparable factors that have guided the international practice in the establishment of new international institutions or bodies. For an active Tribunal that is fully utilized, these factors are as follows:

(a) The financial system should promote the most efficient and economical administration;

^{1/} In the case of the Preparatory Commission for the United Nations, the reports of the budgetary and financial arrangements were contained in two sections. They dealt with the provisional arrangements and the permanent arrangements (document PC/20, chap. IX, sect. 2, paras. 1-33).

^{2/} See the Chairman's summary of discussions on administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/L.14); see also the working paper on administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.8); as well as that on a scheme to phase in the establishment of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.8/Add.2).

(b) Financial controls should not in any way influence or affect the essential independence and impartiality of this judicial body; 3/

(c) Financial factors should not be permitted to frustrate or hinder the recourse to the Tribunal by all States, whether developed or developing, and by other entities that have access to it.

7. Besides the governing principles referred to above, several other fundamental arrangements would have to be recommended on the basis of experience and the existing practice. These include determinations that:

(a) The budget of the Tribunal should be on an annual or biennial basis; 4/

(b) The Registrar, as chief administrative officer, should formulate and present the initial biennial budget of the Tribunal to the meeting of States Parties, and thereafter as may be determined; 5/

3/ In the case of the United Nations, although it is a political body rather than a judicial body, it was nevertheless determined that its permanent financial system should be so constructed as to promote efficient and economical administration and command the confidence of Members and that financial considerations should be given full weight in the formulation of policy, but financial control ought not to be used to frustrate or hinder the execution of its functions duly agreed (document PC/20, chap. IX, sect. 2, para. 2).

4/ It is to be noted that in the case of the United Nations, the report of the Preparatory Commission recommended an annual budget (document PC/20, chap. IX, sect. 2, para. 3). However, the United Nations has subsequently adopted and approved a biennial budget on 18 December 1973 (General Assembly resolution 3199 (XXVIII)). The first biennial budget was for 1974/75.

5/ In the case of the United Nations, the report of the Preparatory Commission states inter alia that the Secretary-General as chief administrative officer should formulate and present the annual budget of the organization to the General Assembly (document PC/20, chap. IX, sect. 2, para. 5).

/...

(c) States Parties should establish or determine an appropriate review mechanism to, inter alia, examine and facilitate the approval of the budget submitted by the Registrar; 6/

(d) A determination needs to be made as to the currency in which the Tribunal will operate; 7/

(e) A determination needs to be made as to the sources of funding for the Tribunal and the manner in which the expenses would be apportioned between States Parties, the Authority and parties to proceedings before the Tribunal according to the capacity of each to pay, taking into account the established criteria and the international practice in this regard. 8/

6/ See LOS/PCN/SCN.4/L.14, pp. 4 and 5.

In the case of the Preparatory Commission of the United Nations, the report stated that "the General Assembly should appoint an advisory committee for administrative and budgetary questions to, inter alia:

- (i) Examine and report on the budget submitted by the Secretary-General to the General Assembly;
- (ii) Advise the General Assembly concerning any administrative and budgetary matters referred to it; and
- (iii) Consider and report to the General Assembly on the auditors' reports on the accounts of the specialized agencies" (document PC/20, chap. IX, sect. 2, paras. 6-9).

Other United Nations programmes and bodies, for example the United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA) utilize the same mechanism, viz., the United Nations the Advisory Committee on the Administrative and Budgetary Questions (ACABQ), while several United Nations agencies have their own review mechanisms.

7/ In the case of the United Nations, it was decided that since the greater part of the expenditure of the United Nations would be incurred in the State in which the Organization had its Headquarters, the currency used for the operation of the United Nations should be the currency of that State (document PC/20, chap. IX, sect. 2, para. 11).

8/ See the 1982 United Nations Convention on the Law of the Sea, annex VI, arts. 19 and 34. Article 4 of the Agreement establishing the International Fund for Agricultural Development (IFAD) states that the resources of the Fund shall consist of (i) initial contributions, (ii) additional contributions, (iii) special contributions from non-member States and from other sources, and (iv) funds derived from operations or otherwise accruing to the Fund.

III. PROVISIONAL ARRANGEMENTS

8. Pending the review and adoption of the first budget of the Tribunal, it would appear necessary to find the means to finance the interim expenditures and to control the budget of the Tribunal. Besides adopting the first budget, some delay can be anticipated in the approval of the scale of assessments and in determining the methodology for the apportionment of the expenses between States Parties, other parties to proceedings and the International Seabed Authority. 9/ For this purpose, in the international context the existing experience has been the adoption on an interim basis of the scale of assessments in use by a pre-existing international organ. Such an arrangement would necessarily be without prejudice to the adoption of a scale of assessments, specific to the new organization. 10/

9/ In the case of the United Nations, it was recommended that the expenses of the United Nations be apportioned between Member States according to the capacity to pay, taking into account:

- (i) Comparative income per head of population;
- (ii) Temporary dislocation of national economies arising out of the Second World War;
- (iii) The ability of Members to secure foreign currency.

Pending the voting of the first annual budget of the United Nations by the General Assembly, it was necessary to find means of meeting and controlling the interim expenditures of the Organization since the first budget was not to be approved by the General Assembly until the second part of its first meeting and also in view of the lapse of time required before contributions to the first annual budget were actually received. It was decided that the provisional period for which it would be necessary to make financial arrangements should cover the whole of the financial period up to 31 December 1946. The Preparatory Commission therefore recommended that the General Assembly, during the first part of its session, should examine and approve a provisional budget and should establish a working capital fund (document PC/20, chap. IX, para. 13).

10/ In the case of the United Nations, as a matter of convenience the scale of assessments of the Food and Agriculture Organization (FAO) was taken to determine initially the amount of the contribution of each Member to the fund of the United Nations. However, the report of the Preparatory Commission stressed that such a scale should not be considered a precedent and should be superseded as soon as the General Assembly had adopted a scale for the allocation of contributions to the first annual budget (document PC/20, chap. IX, paras. 19 and 20).

IV. WORKING CAPITAL FUND

9. The establishment of a working capital fund may be necessary for the provisional budget of the Tribunal. The need for such a fund is foreseen in order to cover the initial period, perhaps one or two years, before the scale of assessments is approved and the assessed contributions are paid in. Such a fund should also cover incidental costs resulting from the first meeting of States Parties.

10. Given the necessity to maintain a financial reserve for the administration of the organization, it would probably be appropriate to continue the arrangement for a working capital fund, in addition to the general fund, even beyond the initial phase and the provisional budget. This has been the experience of international organizations and particularly so in the case of the United Nations. 11/

V. ALTERNATIVE SOURCES OF INITIAL FUNDING

11. The alternative approaches and solutions to the initial financing of a new international institution have been diverse and the practice is varied. Where there has been prior approval of the arrangement for apportioning expenses among the members of the new organization, and where advanced payment against the assessed contributions was required of them, these contributions have served as the source of initial funding. However, where there has been a delay in approving the manner of assessment and in securing contributions, alternative means of funding have been provided. These have included:

- (a) A reimbursable or non-reimbursable loan from the parent organization;
- (b) Advances against future contributions from States that are prospectively members of the new institution;
- (c) Reimbursable or non-reimbursable contributions by States that have taken an initiative in establishing the organization or by host countries to new institutions.

12. In the case of the United Nations, the provisional arrangements were met by advances from Governments against future contributions. In this case, however, the Government concerned later treated those advances as

11/ Report of the Fifth Committee to the General Assembly on budgetary and financial arrangements for the United Nations (document A/44). See also footnote 15 below.

non-reimbursable loans and did not seek credit for those payments against the assessed contributions. 12/

13. In the case of the United Nations Industrial Development Organization (UNIDO), a reimbursable loan was provided by the United Nations on the basis of a schedule of payments to reimburse the United Nations. Later, the schedule was extended to permit the new organization further time to reimburse the loan. 13/

14. In the case of the United Nations University, the host country (Japan) made a very substantial contribution amounting to \$100 million to the endowment fund for the establishment of the University. Other countries, foundations and individuals also contributed to this fund. As part of the agreement, it was also decided that wherever a centre was located, the host Government would be responsible for the full capital and operating costs for

12/ In the experience of the United Nations, the contributions to the working capital fund were not credited to the assessed contributions of Member States in accordance with a subsequent decision of the General Assembly (document A/44: Budgetary and financial arrangements; reports of the Fifth Committee to the General Assembly; General Assembly resolution 14 (I)).

13/ The General Assembly of the United Nations, by its resolution 34/96 of 13 December 1979, para. 8, authorized the Secretary-General, in consultation with the Advisory Committee on Administrative and Budgetary Questions (ACABQ), to loan to the new agency, until it received sufficient contributions or advances from its members an amount not exceeding one half of the appropriations for the existing United Nations Industrial Development Organization for the last calendar year of its existence, to meet the expenses of the initial operations of the new agency for the last calendar year following that in which its General Conference was first convened, and to take the necessary budgetary measures. And by its resolution 40/253 A of 18 December 1985, the General Assembly approved a special appropriation of \$US 24 million to finance a loan to UNIDO. The modalities of the loan were approved by ACABQ and repayments were to be made in accordance with a schedule that required the loan to be fully repaid by 31 December 1987.

the centre, except that where the centre was located in a developing country, there would then be some readjustments in the requirements. 14/

15. The working capital fund for a new international institution may be made up of advances from States Parties. These advances could be reimbursable or non-reimbursable, or eventually set off against assessed contributions. 15/ There has also been a recent experience where the working capital fund was very substantially contributed to by the host country, which also provided host facilities. 16/ Another alternative in the existing experience has been the provision of a loan from the United Nations. 17/

14/ The Secretary-General stated in his report on the work of the Organization for 1973 that, in pursuance of General Assembly resolution 2951 (XXVII) of 11 December 1972, an endowment fund had been established consisting of voluntary contributions to the University. It was decided by the General Assembly on the recommendation of the founding committee that the expenses of the University would be borne from the income derived from the endowment fund, in addition to operating contributions that were received from Governments etc. Japan, being the headquarters of the University, contributed \$US 100 million to the endowment fund in addition to the continuing operating costs of the University (the University periodically issues a list of contributions to the endowment fund and to the operating costs of the United Nations University). In addition, Japan provided the temporary facilities for the University free of charge. Japan, the host Government, is currently building a permanent headquarters for the University at its own expense. The host Government also provides the residence, free of cost, for the Rector of the University. In addition, Japan has indicated that it will bear the full capital and operating cost of one of the centres to be located in Japan (A/9149).

15/ In the case of the United Nations, the necessary funds for the provisional budget were foreseen to be provided out of a Working Capital Fund. This Fund was also to cover: (1) the expenditure of the Organization for the calendar year 1946; (2) the cost of the Preparatory Commission; and (3) the costs incidental to the convening of the first meeting of the General Assembly incurred prior to 31 December 1945. Since delays in the receipt of substantial contributions to the first budget were expected, the Fund was proposed to be large enough to cover the expenditure to be incurred in 1946 with a suitable margin. The Preparatory Commission report proposed that the Working Capital Fund should consist of advances which would stand to the credit of members and eventually be set off against the assessed contributions. It was also recommended that the Working Capital Fund should form an essential feature of the permanent financial arrangements of the Organization in order to ensure means for contingencies (document PC/20, sect. 2, paras. 19, 20 and 21).

16/ See footnote 14.

17/ See footnote 13.

VI. THE PROVISIONAL FINANCIAL REGULATIONS

16. Another important component of the preparatory materials and recommendations emanating from the Preparatory Commission would be the presentation of draft provisional financial regulations and a report on their review. Such regulations would be expected, inter alia, to incorporate the terms of the provisional budget and of the working capital fund. 18/ There is also early experience of the initial expenses being provided by the Government of a State. 19/

18/ In the case of the Preparatory Commission for the United Nations, draft provisional financial regulations for the United Nations were also proposed in the report in which, inter alia, the terms of the provisional budget and the Working Capital Fund were laid down. There would be a short period before the Working Capital Fund could be established and the expenses of the Organisation would have to be financed by some other means (document PC/20, chap. IX, sect. 2, annex).

19/ In the case of the United Nations, the report of the Preparatory Commission states that the expenses incurred by the Commission and the expenses incidental to the convening of the first meeting of the General Assembly should be met by the Government of the United Kingdom of Great Britain and Northern Ireland or, if the Commission so requested, shared by other Governments. All such advances should be deductible from the contribution of the Governments concerned to the first annual budget. The gap was to be covered by some similar arrangements (document PC/20, chap. IX, sect. 2, para. 22).